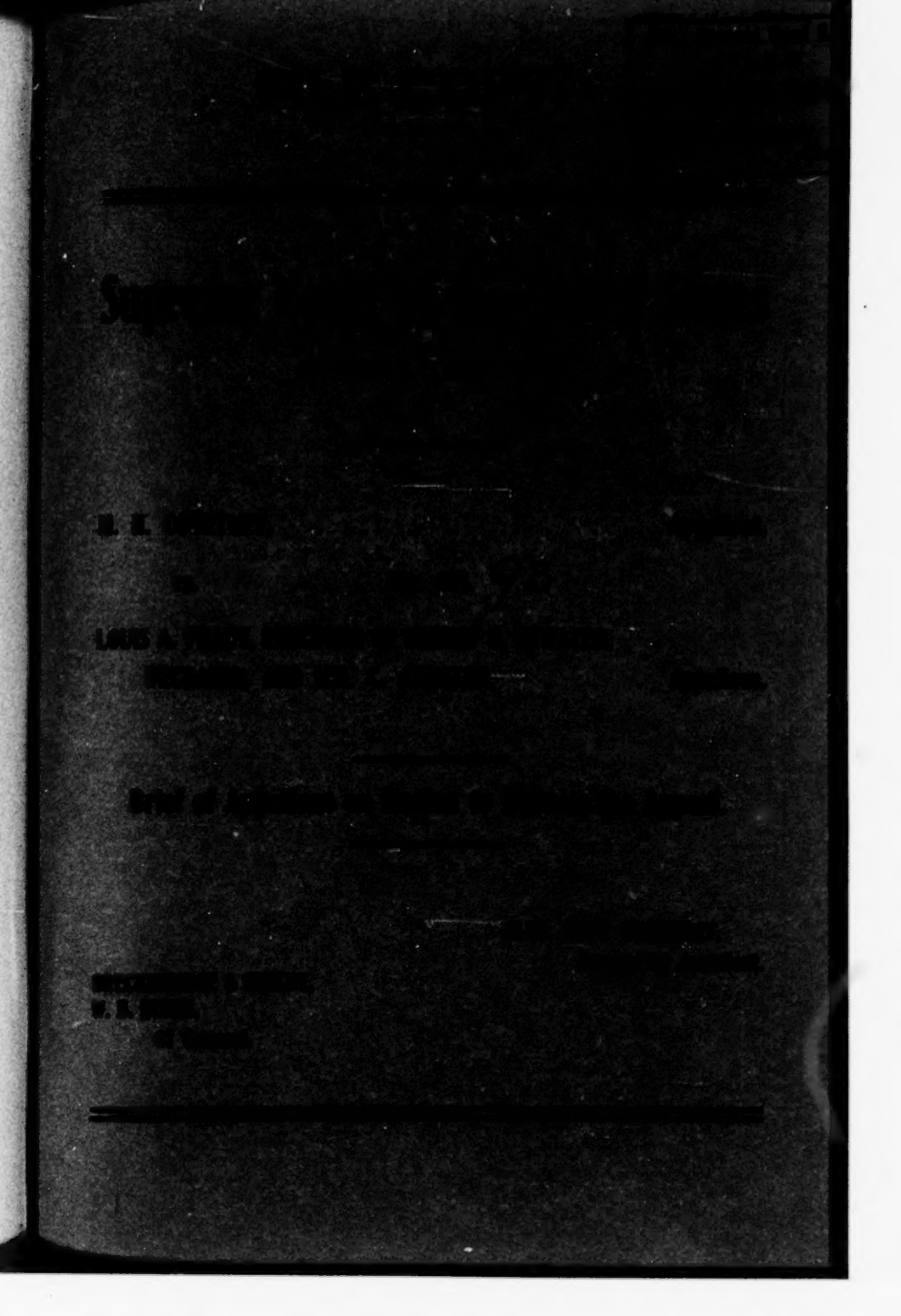

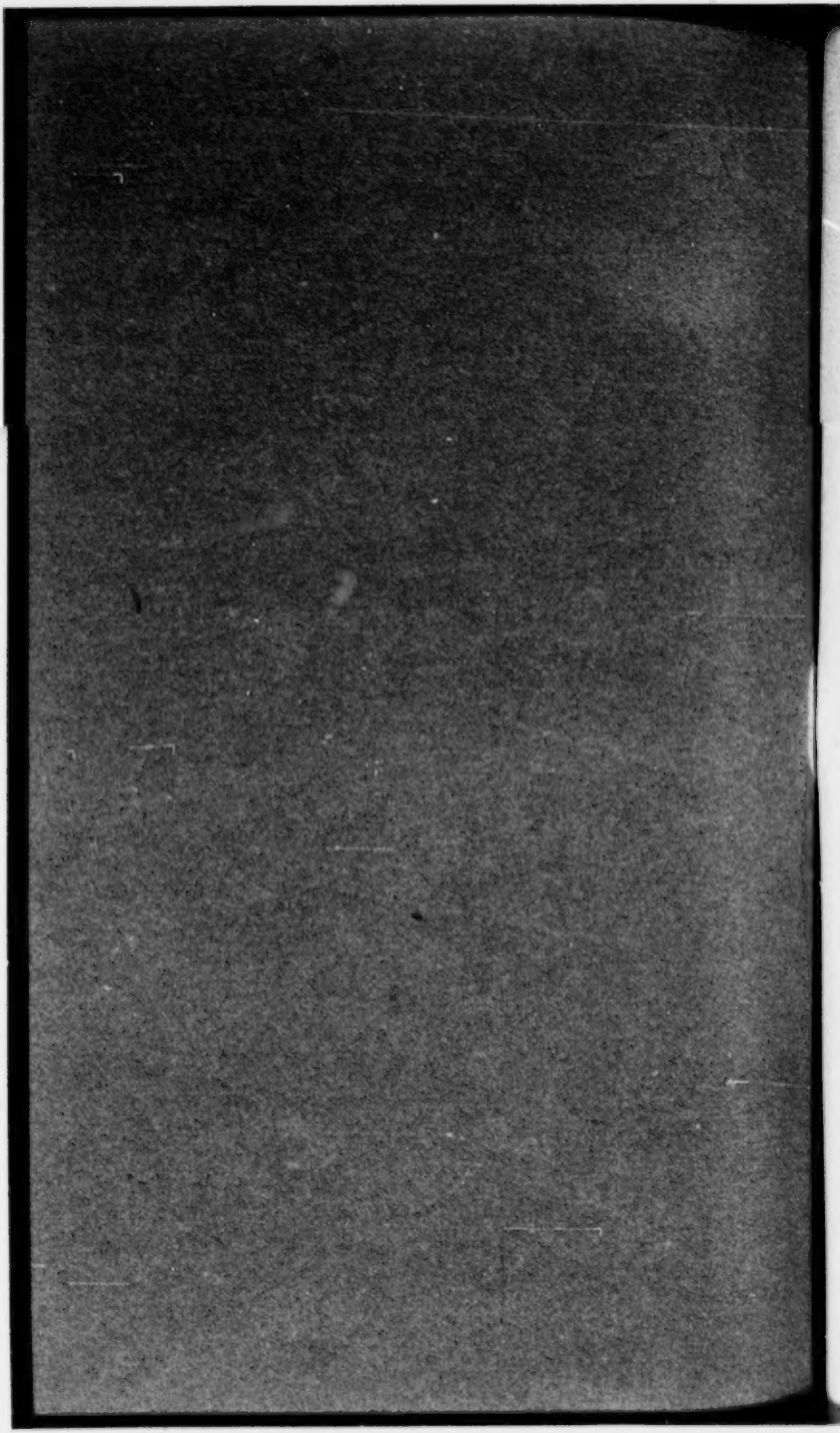

Supreme Court of the United States,

OCTOBER TERM, 1903.

M. H. COURTNEY, - - - - - - Appellant,

vs. No. 371.

LOUIS A. PRADT, EXECUTOR OF MERRIT B. ATWATER, DECEASED, AND WM. C. ATWATER, - - - - - - - Appellees.

BRIEF OF APPELLANT ON MOTION TO DISMISS THE APPEAL.

The appeal herein is from a decree of the United States Circuit Court for the Eastern District of Kentucky, dismissing for want of jurisdiction a suit which had been removed to that court from the Powell County Circuit Court wherein a petition in equity had been filed against non-resident defendants, and jurisdiction obtained over the *res* by warning order and foreign attachment. There was no personal service of summons upon the defendants, and they have entered their appearance only for the purpose of objecting to the jurisdiction of the court. They, being the appellees here, have moved to dismiss the appeal upon five grounds, all of which will be considered in this brief in the order in which they are stated in the motion.

I.

Their first ground is, "First. Because the appeal herein does not involve the jurisdiction of the said circuit court as a federal tribunal as contemplated by the judiciary act of March 3, 1891, section 5."

As to this ground, appellant contends that the appeal does involve that question of jurisdiction, in that the circuit court had no jurisdiction to proceed in the

case and should have remanded it to the State court: First, because the defendants were before the court by constructive service only, and second, because the nature of this controversy is such that the suit was not properly cognizable in the United States Circuit Court as a federal tribunal.

THE DEFENDANTS WERE BEFORE THE COURT BY CONSTRUCTIVE SERVICE ONLY.

Could the United States Circuit Court proceed in the cause, unless there was actual service of process on the defendants, or an entry of their appearance? We think this question has been repeatedly answered by this court, that it could not.

In Pollard v. Dwight, 4 Cranch, 421, Dwight and others brought a foreign attachment against Pollard and Pickett, returnable to the county court of Hartford, Conn. The defendants removed the action to the circuit court of the United States for the district of Connecticut. This court said, page 429:

> "By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and, consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the State court in which it was instituted, and this court would be bound now to direct that proceeding."

In Toland v. Sprague, 12 Peters, 328, in considering a case of foreign attachment, authorized by the statutes of Pennsylvania, this court said:

> "Although the process acts of 1789 and 1792 have adopted the forms of writs and modes of

process in the several States, they can have no effect where they contravene the legislation of Congress. The state laws can confer no authority on this court, in the exercise of its jurisdiction, by the use of state process, to reach either persons or property; which it could not reach within the meaning of the law creating it."

On page 330, it said:

"With these views, we have arrived at the same conclusions as the circuit court of Massachusetts, as announced in the following propositions, namely: 1. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2. That independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of Congress adopting the state process, adopt the form and modes of service, only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court, *in personam;* that is, where they are inhabitants, or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add, that even in case of a person being amenable to process *in personam,* an attachment against his property can not be issued against him, except as part of, or together with process to be served upon his person."

In Chaffee v. Hayward, 20 Howard, page 215, the court said:

"It has been several times held by this court as the true construction of the foregoing section,

> that jurisdiction of the person of a defendant (who is an inhabitant of another State) can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a State attachment law. The doctrine announced to this effect, in the case of Toland v. Sprague, in 1838, (12 Peters, 327) has been uniformly followed since, both by this court and at the circuits. (15 Pet., 171; 17 How., 424.)"

In ex parte Railway Company, 103 U. S., 794, the circuit court of the United States for the district of Iowa had dismissed a suit and dissolved an attachment, issued and levied in accordance with the laws of Iowa, on property of a non-resident defendant, who was not found within the district and who was a citizen of Massachusetts. Application was made to this court for a mandamus to compel the circuit court to re-docket the case and grant an order of service by publication and to proceed to hear the cause. The mandamus was denied by this court. On page 796, it said:

> "It is conceded that the person against whom this suit was brought in the Circuit Court was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the district of Iowa, and unless he could be sued no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."

In Harland v. United Lines Telegraph Co., 40 Fed. R., 308, the court held that the act of March 3, 1887, "introduced no new principle which obviated the necessity of personal service" in attachment cases.

It said:

"It will be readily admitted that the United State courts, which are created by statute 'can have no jurisdiction but such as the statute confers' (Sheldon v. Sill, 49 U. S., 8 How., 441, 12 L. ed. 1147), and that this doctrine has been asserted with great earnestness by the supreme court. It is furthermore evident that a State may subject property situated within its limits, which is owned by non-residents, to the payment of the demands of its own citizens, and that, when the non-resident can not be personally served with process, the statutes of the State may authorize a constructive service, which shall be sufficient to subject the property to a proceeding *in rem;* but such proceedings must be authorized and derive their validity from the local statutes. Pennoyer v. Neff, 95 U. S., 714 (24 L. ed. 565.)

"Neither can it be denied that prior to the enactment of sections 914 and 915 there was no statute of the United States which gave authority to a circuit court, by original process, in an action at law, to seize the property of a non-resident defendant, and subject it to the demands of a resident plaintiff, without personal service upon the defendant, and, in the case of a corporation, upon such agents as may properly be deemed its representatives, or the voluntary appearance of the defendant in the suit.

"In the well known case of Toland v. Sprague, 37 U. S., 12 Pet., 300 (9 L. ed. 1093), the following proposition was announced, which has since been adhered to (Curt. Jur. of U. S. Courts, 105); and in Ex parte Des Moines & M. R. Co., 103 U. S. 794 (26 L. ed. 461), was evidently regarded as axiomatic: "(4) That the right to attach property, to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court *in personam;* that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resi-

dent abroad, at the commencement of the suit, and have no inhabitancy here; and we add that, even in case of a person being amenable to process *in personam*, an attachment against his property can not be issued against him, except as part of, or together with process to be served upon his person.'

"In ex parte Des Moines & M. R. Co. decided in 1880, Chief Justice Waite said: 'It is conceded that the person against whom this suit was brought in the circuit court was an inhabitant of the State of Massachusetts, and was not found in, or served with process in, Iowa. Clearly, then, he was not suable in the Circuit Court of the district of Iowa, and unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and, unless the suit can be maintained, the attachment must fall.'

"The attachment in that case was made in accordance with the statute of the State of Iowa in regard to attachments of the property of non-residents. But it is said, notwithstanding this decision was made after sections 914 and 915 were passed, that those sections confer upon the circuit courts jurisdiction *in rem* over attached property of non-residents which is situated within the limits of the State wherein the suit is brought, if the attachment is made in conformity with State laws. Section 914 assimilates the practice, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the courts of the United States, to the practice, forms and proceedings in the courts of record of the State within which such circuit or district courts are held. The statute is an act in regard to practice and procedure, and not in regard to jurisdiction. The question at issue in this case relates to the power of the court. Section 914 con-

fers no new power or authority upon the circuit court.

"In Butler v. Young, 1 Flip. 276, the distinction which is to be observed, in the construction of this section, between power which is conferred and practice which is to be observed, is clearly pointed out. The court says: 'Care and caution will be used that substantive rights given by the State laws shall not be confounded with what is mere practice in the State courts. In this connection, I may mention, among other matters, the right to bring an absent or non-resident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the State, and in my opinion, were not contemplated by Congress, by the law in question, to be given to parties in this court.' Wear v. Mayer, 6 Fed. Rep., 660; Lyons v. Lyons Nat. Bank, 19 Blatchf., 279, 8 Fed. Rep., 369; New York L. Ins. Co. v. Bangs, 103 U. S., 435 (26 L. ed., 580.)

"Section 915 entitles plaintiff, in common law causes in the courts of the United States, to similar remedies by attachment against the property of the defendant which are provided by the law of the State in which such court is held for its courts. It empowers the United States Court to adopt the remedies by attachment or other process, and relates to methods and forms. It does not create jurisdiction over property without personal service upon the defendant.

As succinctly stated by Mr. Justice Miller, in Nazro v. Cragin, 3 Dill., 474: 'The effect of this section in the Act of 1872 is simply this: If the court has or can acquire jurisdiction over the defendant personally, this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction.' Chittenden v. Darden, 2 Woods, 437."

It is evident, we think, in the light of the above authorities, that section 4 of the judiciary act of March 3, 1875, providing that upon the removal of a suit from the state to a federal court, any attachment had in the state court shall hold the property attached to answer the final judgment or decree in the same manner as by law it would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced, was not intended to enlarge the jurisdiction of the federal courts so as to permit a judgment or decree to be rendered in the removed case upon constructive service only.

THE NATURE OF THIS CONTROVERSY IS SUCH THAT IT WAS NOT PROPERLY COGNIZABLE IN THE UNITED STATES CIRCUIT COURT AS SUCH.

But if this court should be of the opinion that the filing of the special demurrer (Printed Record, pages 13 and 14), by the defendant, L. A. Pradt, Executor, was equivalent to him entering his appearance in the cause, and that this gave the circuit court power to proceed as against him—then, we say, that the nature of the suit against him is such that the circuit court could not proceed; that the case comes clearly within the principles decided in Cates v. Allen, 149, U. S., 452 and authorities there cited.

The nature of this suit against the defendant, executor, is such that common law courts would have had exclusive jurisdiction of it, but for the fact that he is a non-resident of the State of Kentucky. It is a suit upon a written contract, to recover of him, eight thousand dollars, with interest, from a certain day. The defendants however, being non-residents, the plaintiff, was compelled by the State Statutes to sue in equity—the courts of equity alone being given jurisdiction of attachment proceedings against non-residents. The circuit court, however, took issue with us on this proposition. It said in its opinion, Record 18:

> "If such a suit as that brought herein is maintainable it is a suit at law. The mere fact that an attachment is sued out in it does not make it a suit in equity. The early attachment statutes of Kentucky may have provided that the suit should be in equity. But the present attachment statutes do not so provide, and they more frequently find application in actions at law than in suits in equity."

An examination of the present statutes, together with the earlier ones, will, we think, show clearly that the circuit court was in error on this point.

Prior to the adoption of a code of practice in Kentucky, the statute law providing upon what grounds attachments might issue and in what courts attachment suits might be brought, is found in the following two acts of the Legislature of Kentucky. The act of 1839, Session Acts, page 259, entitled "An act to reduce into one the several attachment laws, and for settling proceedings on attachments against absconding debtors," approved February 20, 1839, related to attachments at law, and provided the following grounds upon which an attachment at law might issue:

"Section. 1. That it shall and may be lawful for any creditor (or in his absence, his agent), to go before any justice of the peace of the county in which his debtor resides or last resided, and make complaint that his debtor is removing out of the county privately, so that the ordinary process of the law can not be served upon him, or absconds and conceals himself so that the ordinary process of law can not be served upon him; upon which complaint, such justice shall issue an attachment against the estate of such debtor, or so much thereof as shall be of sufficient value to satisfy the debt, interest and cost of such creditors, returnable before himself or some other justice of the peace, when the debt shall be fifty dollars or under, and returnable to the circuit court of his county, when the debt shall exceed fifty dollars." . . . . . .

"Sec. 6. When the sheriff, or other proper officer, shall return, on any writ of *capias,* or upon a warrant, to answer in any civil action, that the defendant 'is not found within his county,' the plaintiff may sue out an *alias* or *plurics capias,* or another warrant, until, the same shall be served; or such plaintiff may, at his election, sue out an attachment against the estate of the defendant to force an appearance; and if the sheriff, or other officer, shall return that he hath attached any goods, and the defendant shall not appear and replevy the same, the plaintiff shall be entitled to a judgment for his debt or damages, and costs; which judgment shall be final in all actions of debt founded on any specialty, bill or note in writing, ascertaining the demand, unless the plaintiff shall choose, in any such case to have a writ of inquiry of damages; and in other cases the damages shall be settled by a jury, sworn to inquire thereof." . . . . . .

These were the only grounds upon which an attachment at law could issue prior to the adoption of the code. It is clear that this act did not authorize an attachment at law to issue upon the ground that the defendant was a non-resident, and that it did not give to the common-law courts of Kentucky jurisdiction of attachments against a non-resident. The chancery courts, however, were given jurisdiction by the act of 1837, Session Acts, page 103. This act related to two classes of defendants: 1. Those who were "non-residents of this State;" and 2, those who were "absent from the same." It provided:

"Sec. 1. That when any person or persons, co-partnership or corporation, have any claim or demand, in law or equity, due and owing from any other person or persons, co-partnership or corporation, who, or some of whom, are non-residents of this State, or absent from the same, or the officer or officers of the corporation, who ought to be served with process, are non-residents of this State, or absent from the same, and there shall be within this State any person or persons, co-partnership or corporation, indebted to such person or persons, co-partnership or corporation, who are, or some of whom

are, non-residents of this State, or absent from the same, as aforesaid, or shall have in possession, or under control, any land or effects, belonging to such person or persons, company or corporation, or when such lands and effects shall be within this State, then, in all such cases, it shall and may be lawful for the person or persons, co-partnership or corporation, having the claim or demand, to file a bill in chancery, and attach such lands and effects, and the debts due by the person or persons, co-partnership or corporation, within this State, to the person or persons, co-partnership or corporation, who, or some of whom, as aforesaid, are non-residents, or absent from the State: *Provided,* That no such attachment shall be available against any absent defendant, without an allegation, supported by oath, that the absent defendant has left the State to avoid suit by the ordinary process of law, or has been without the State for such length of time, that one term of the circuit court, where such absent defendant usually resides, has intervened during his absence, and the service of the ordinary process of law has been impracticable."

It will be observed that this act gives jurisdiction of attachments to the courts of chancery of any claim or demand *in law or in equity* against non-resident or absent defendants, whenever there is a person within the State indebted to such defendant, or when such defendant has property, real or personal, within the State.

In Watts v. Griffin, Litt. Select Cases, 244, the court of appeals of Kentucky, in 1821, passed on the validity of a similar statute to this, and held that it was constitutional, notwithstanding it dispensed with a jury trial as to common-law demands.

The court said, page 245:

> "The power of the court over such a case may be readily perceived by adverting to the provisions of the statute of this country regulating attachments in chancery and proceedings against absent defendants. That statute was admitted in argument to confer upon the Court of Chan-

cery jurisdiction, in cases which would otherwise be properly cognizable at law."

After referring to the various Virginia Statutes, from which the Kentucky Statute was taken, the court, on page 247, said:

> "The propriety of the court deciding without calling a jury, might have been more doubtful, if at the adoption of our Constitution, the matter had been exclusively cognizable at law, and the Court of Chancery had taken jurisdiction under a statute subsequently enacted. A decision of the facts by the court, might then be considered an innovation on the ancient right of trial by jury, and in conflict with that provision of the Constitution which declares that the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate. But the statutes to which we have referred, were all enacted long before the adoption of the Constitution, and any power which the court derived from those statutes before the adoption of the Constitution, may, no doubt, now be exercised without violating any constitutional provision. The statute of this country, it is true, was enacted after the adoption of our first Constitution, but that statute confers no power on the court which it did not possess under the statutes of Virginia; and, according to those statutes, we apprehend, the court might decide the cause without a jury. Those statutes contain no express provision as to the mode of deciding the cause, but they contain a grant of jurisdiction, and that implies a grant of all power necessary to a final decision of the matter in contest."

It is clear from the two acts above quoted—the one conferring jurisdiction on courts of law to issue attachments against absconding debtors, the other conferring jurisdiction on courts of chancery to issue attachments

against non-residents and absent defendants—that the latter jurisdiction was, at that time, *exclusively* within the courts of chancery. Both of these acts remained in force until the adoption of the Code of Practice. The first Code of Practice was adopted by an act entitled, "An Act to establish a Code of Practice in civil cases in the courts of this Commonwealth," approved March 22, 1851. It took effect August 1, 1851.

Section 242 of that Code related to "Grounds of Attachment." It did not relate to the jurisdiction of the courts. It provided:

> "Sec. 242. The plaintiff in a civil action, may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered:
>
> First. In an action for the recovery of money where the action is against
>
> 1. A defendant, or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of this State; or
>
> 2. Who has been absent therefrom four months."

There are six other grounds set out in this section. Section 3 of that Code provides:

> "Sec. 3. The proceedings in a civil action may be of two kinds:
>
> "1. Ordinary.
>
> "2. Equitable."

Sections 4 and 5 relate to the jurisdiction of the courts. They provide:

> "Sec. 4. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of this Code, had jurisdiction, and must so proceed, in

all cases where such jurisdiction was exclusive."

"Sec. 5. In all other cases, the plaintiff must prosecute his action by ordinary proceedings."

It is thus seen, by section 4, that all actions which were *exclusively* cognizable in chancery before the adoption of that Code, *remained so,* after its adoption.

The present Code contains substantially the same provisions, in regard to the grounds of attachment and jurisdiction of the courts, as those contained in the Code of 1851. Section 194 provides:

"Sec. 194. The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as is provided in section 227, as a security for the satisfaction of such judgment as may be recovered:

1. In an action for the recovery of money against—

1. A defendant, who is a foreign corporation, or a non-resident of the State; or

2. Who has been absent therefrom four months."

It also contains eight additional grounds for attachment.

When the Circuit Court said, in its opinion, that the present attachment statutes "more frequently find application in actions at law than in suits in equity," it doubtless had in mind attachments issued on these eight additional grounds.

This section does not relate to the jurisdiction at all.

Section 6 of the present Code, relating to the jurisdiction of the courts, is:

"Sec. 6. Unless otherwise provided by this Code or other statute—

1. Actions of which courts of chancery had jurisdiction before the first day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable."

There is no statute, other than the Code, bearing upon this question of jurisdiction, and the only other sections of the Code bearing upon it are the following:

> "Sec. 8. An error of the plaintiff as to the form of action shall be cause, not for the abatement or dismissal of it, but merely for a change into the proper proceedings by an amendment of the pleading, and a transfer of the action to the proper docket."
>
> "Sec. 10, sub. sec. 3. The court may, without motion, order the transfer of an action from one docket to another if either party be entitled to such transfer; or may try the action, or render judgment therein by default, unless a party entitled to a transfer move therefor."

It is thus seen that the present Code provides that all actions of which the courts of chancery had exclusive jurisdiction prior to the 1st day of August, 1851, the date the first Code took effect, *must be equitable,* although it allows the court to try an action erroneously brought at law when it should have been brought in equity, and *vice versa,* where no motion to transfer is made.

It follows that the suit at bar was properly brought in the State court as a suit in equity, and that it could not have been *properly* brought there as a suit at law.

There is one other section of the Code that may have a bearing. It is section 12. It provides:

> "In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer."

It is at least doubtful whether this section applies to the case at bar at all, but if it does, it is only after

the defendants have entered their appearance and moved to transfer this case to the ordinary docket, and even then the Court of Equity would have to try the issues made by the attachment. That the attachment issues could not be transferred to the ordinary docket, to be tried by a jury, is decided by Meek v. McCall, 80 Ky., 371. That case was brought on the equity side of the docket, and there was a plea of payment and set-off. The court, on page 375, said:

> "The attachment did not invest the court with the right to determine a cause of action purely legal against the objection of the defendant, and on the plea of payment or set-off the appellant in this case had the undoubted right to have a jury pass upon the issue of fact."

In speaking of section 12 of the Code, the court said:

> "This section, of course can not apply when the exercise of equity jurisdiction is made to depend on the result of the legal issues; and this action is in fact, so far as the account and notes are concerned, an action ordinary with an attachment—the legal issues to be tried by a jury and the issues made by the attachment by the court."

Now the question presents itself, Could the United States Circuit Court properly take cognizance of such a suit as this?

In Cates v. Allen, 149 U. S., 456, this court, referring to the case of Scott v. Neely, 140 U. S., 106, said:

> "It was there shown that the Constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction between law and equity, and that equitable relief in aid of de-

mands cognizable in the courts of the United States only on their law side could not be sought in the same action, although allowable in the State courts by virtue of State legislation; Bennett v. Butterworth, 11 How., 669; Thompson v. Railroad Companies, 6 Wall., 134; Scott v. Armstrong, 146 U. S., 499, 512; and that the Code of Mississippi, in giving to a simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity to be heard and disposed of without a trial by jury, could not be enforced in the courts of the United States because in conflict with the constitutional provision by which the right to a trial by jury is secured."

And, on page 459, it said:

"The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for in order to invoke equity interposition in the United States courts the lien must exist at the time the bill is filed and form its basis, and to allow a lien resulting from the issue of process to constitute such ground would be to permit State legislation to withdraw all actions at law from the one court to the other, and unite legal and equitable claims in the same action, which can not be allowed in the practice of the courts of the United States, in which the distinction between law and equity is matter of substance and not merely of form and procedure. And as the ascertainment of the complainants' demand is by action at law, the fact that the chancery court has the power to summon a jury on occasion can not be regarded as the equivalent of the right of trial by jury secured by the

Seventh Amendment. Whitehead v. Shattuck, 138 U. S., 146; Buzard v. Houston, 119 U. S., 347."

How, then, could a United States court try the suit at bar? It could not try it as a suit in equity, because "the ascertainment of complainant's demand is (in the federal tribunals) by action at law." It could not try it as a suit at law, because the Kentucky Code gives exclusive jurisdiction to courts of equity of attachments against non-resident defendants.

II.

The second ground of the motion to dismiss the appeal is:

"Second. Because the decree of said Circuit Court, appealed from dismissing appellant's case, was not based on a denial of the jurisdiction of that court as a Federal Court, but, in the exercise of that jurisdiction: and the case was dismissed for the reason that a suit can not be maintained in the courts of Kentucky against a foreign executor."

In reply to this we say that dismissing the case for the reason that a suit can not be maintained in the courts of Kentucky against a Wisconsin executor, presents precisely the same question of jurisdiction as would have been presented in the case of Mexican Central Railway Co. v. Eckman, 187 U. S., 429, had the lower court in that case dismissed the suit for the reason that the Texas law did not permit a Texas guardian to bring a suit in his own name as guardian.

In that case, an action was brought in the Circuit Court of the United States for the Western District of Texas by J. W. Eckman, a citizen and resident of that district, as guardian of Alphonso Huesselmann, a minor, against the Mexican Central Railway Co., a corporation of Massachusetts, to recover damages for injuries sustained by him in the Republic of Mexico, through the negligence of the company in whose employment he then was. Defendant filed a plea in abatement, and asked that the action be dismissed on the ground

that Huesselmann and his parents were citizens and residents of the State of Illinois, and that defendant was a resident and citizen of Massachusetts and had not waived its right to be sued there. This plea was overruled, the case tried before a jury and a verdict and judgment rendered in favor of plaintiff. This court, after declining to consider the case on its merits, did consider the question of the jurisdiction of the Circuit Court as a court of the United States. On page 433 it said:

> "The question is whether under the laws of Texas a guardian can sue in his own name to recover damages for injuries sustained by the ward, and it is unaffected by the permanent domicile of the ward. Hoyt v. Sprague, 103 U. S., 613; New Orleans v. Gaines' Administrator, 138 U. S., 595, 606; Delaware County v. Diebold Safe Company, 133 U. S., 473, 488."
>
> . . . . . .
>
> "If, in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond."

The opinion then quotes the Texas Statutes and considers the rulings of the Texas court as to the power of the guardian to sue in his own name, and concludes:

> "We are unable to hold that the Circuit Court erred in assuming that this guardian had the legal right to bring the action in his own

name, and it is on his citizenship and not on the citizenship of the ward that the jurisdiction of the Circuit Court depended."

Now, suppose that the Circuit Court in the Texas case had dismissed the suit on the ground that the guardian could not, by the laws of Texas, bring the suit in his own name as guardian, would not that present essentially the same question as that presented by the case at bar? Would this court then have dismissed the writ of error in that case, as it is asked to dismiss the appeal in this case, on the ground that the dismissal of the Texas case "was not based on a denial of the jurisdiction of that court as a Federal Court, but in the exercise of that jurisdiction?" Of course it would not.

The question in that case, to state it differently, was whether the guardian, as such, was a citizen of a different State within the meaning of the provisions of the Constitution and laws of the United States, conferring jurisdiction on the federal courts. That question depended on whether the guardian, as such, had power by the laws of Texas to sue in his own name. If he did have such power, then he was, as guardian, a citizen of a different State within the meaning of those provision. If he did not have such power, then he was not, as guardian, a citizen of a different State within the meaning of those provisions. Precisely the same question is presented in the case at bar, for here the question is whether a Wisconsin executor, as such executor, is a citizen of a different State from that of the plaintiff within the meaning of those provisions. This question is dependent upon whether or not such Wisconsin executor can be sued in the courts of Kentucky. If he can be sued there, then, as such executor, he is a citizen of a different State within the meaning of those provisions. If he can not be sued there, then, as such executor, he is not a citizen of a different State within the meaning of those provisions.

In the Texas case, if the guardian could sue, then the Federal Court, as such, had jurisdiction. If he could

not sue, then it did not have jurisdiction. In the case at bar, if the executor could be sued, then the Federal Court, as such, had jurisdiction. If he could not be sued, then it did not have jurisdiction. The question in the Texas case and the question in this case both necessarily involve the power of the Federal Courts, as such, over those classes of the citizens of different States. In the Texas case, this court held, in effect, that the guardian was a citizen of a different State within the meaning of the Constitution and laws of the United States conferring jurisdiction on Federal Courts, because he had the right, under the laws of Texas, to bring the suit in his own name as guardian. In the case at bar, the Circuit Court held, in effect, that this Wisconsin executor was not a citizen within the meaning of those provisions, because he could not be sued in Kentucky. It denied jurisdiction of the Federal Court, as such, over that class of citizens of different States composed of executors.

The case at bar is easily distinguishable from the case of Louisville Trust Company v. Knott, decided by this court November 30, 1903, and the cases discussed in that opinion. In that case the question was not one of power to act on the person or property of a particular class of citizens, as it is here, but it was a question as to which receiver, State or Federal, had the right to the possession of the property concerned.

This court there said:

> "In principle, the judgment in Smith v. McKay embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its au-

thority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such questions should be the basis of a direct appeal to this court from a Circuit Court."

In the case at bar, however, we think the power of the Circuit Court as a Federal Court was denied, by dismissing this suit, just as it was sustained in the Texas case.

III.

The third ground of the motion to dismiss is:

"Third. Because the power of the Circuit Court, as a Federal Court, to hear and finally determine all questions and issues involved in this case has not, in any way, been denied, controverted or put in issue."

In reply to this, we say that plaintiffs' motion to remand this case to the State court did necessarily deny, controvert and put in issue the power of the Circuit Court, as a Federal Court, to hear and determine this case. We are not aware of any law requiring the reasons for the motion to be stated in it, and we do not know of any way in which the plaintiff, in a removed case, can controvert the jurisdiction of the court other than by a motion to remand.

Again, the defendant's motion "to dismiss this cause for the want of jurisdiction to try same," and defendant Pradt's special demurrer because, "First, That the court has no jurisdiction of the person of this defendant. Second. That the court has no jurisdiction of the subject matter of the action," necessarily put in issue the jurisdiction of the court as a Federal Court.

IV.

The fourth and fifth grounds of the motion to dismiss are as follows:

"Fourth. Because no question of jurisdiction has

been certified by the Circuit Court to this court for decision, as required by the said Judiciary Act of March 3, 1891, section 5; and no application was made to said Circuit Court for such certificate."

"Fifth. Because no ground of jurisdiction of this court upon this appeal is shown in the record herein."

In the case of *In Re* Lehigh Min. & Mfg. Co. 156 U. S., 327, the court held:

> "But it is unnecessary to determine how this may be, as we think the district judge was quite right in holding that the question had already been sufficiently certified. The question involved was only the question of jurisdiction, and the judgment not only recited that for reasons in writing, filed as part of the order, the court considered that it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction; but the district judge certified in the bill of exceptions that it was 'held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed;' and, in the order allowing the writ of error, certified in effect that it was allowed 'upon the question of Jurisdiction.'
>
> "We observed, in United States v. Jahn, 155 U. S., 109, 112, that 'the provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record."

In Shields v. Coleman, 157 U. S., 168, it was held that where the order of appeal recited "this appeal is granted solely upon the question of jurisdiction," and where the petition for appeal prayed "an order granting

an appeal from said final decree and interlocutory orders, taking and exercising jurisdiction as aforesaid, to the Supreme Court of the United States, as authorized by section 5 of the Act of Congress of the United States, approved March 3, 1891," that this was a sufficient certificate. The court there said, on page 176:

> "The single question presented by this appeal is that of the jurisdiction of the Federal Court to appoint a receiver, and take the railroad property out of the possession of the receiver appointed by the State court. In such cases, as was held in Maynard v. Hecht, 151 U. S., 324, it is essential that the question of jurisdiction alone should be certified to this court from the trial court. But under the authority of United States v. Jahn, 155 U. S., 109, and *In Re* Lehigh Company, 156 U. S., 322, the statement in the last order quoted from the record taken in connection with the petition upon which it was founded must be held to be a sufficient certificate. It is not necessary that the word 'certify' be formally used."

In Interior Construction Co. v. Gibney, 160 U. S., 219, this court said:

> "The record shows that the only matter tried and decided in the Circuit court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891, c. 517, section 5, 26 Stat., 828; *In Re* Lehigh Co., 156 U. S., 322; Shields v. Coleman, 157 U. S., 168."

In Smith v. McKay, 161 U. S., 356, it is said:

"It is contended on the part of the appellee that we should dismiss this appeal because the question of jurisdiction is not properly certified to this court."

"The record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdicton, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed.* The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied. It, therefore, appears that the appeal was granted solely upon the question of jurisdiction, and this brings the case within the rulings in Shields v. Coleman, 157 U. S., 168, and *In re* Lehigh Mining Co., 156 U. S., 322."

In Huntington v. Laidley, 176 U. S., 676, it is said:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways, by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below."

In Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S., page 285, the court said:

> "As the appeal was taken directly to this court, it must appear, under the fifth section of the Court of Appeals act, either that the question of jurisdiction was certified to this court, or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction."

In the case at bar, the whole record has been filed and printed. The final decree dismissed the suit for want of jurisdiction. It is in the following language:

> "This cause having been heard and submitted on the plaintiff's motion to remand this case to the State court, and on the defendant's demurrer to the jurisdiction of this court, and the motion of defendants to dismiss this case for want of jurisdiction in this court, and the court being fully advised, it is ordered that plaintiff's motion to remand this case to the State court be and it is hereby overruled, to which plaintiff excepts."
>
> "It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this court and motion to dismiss this suit for want of jurisdiction in this court, be and the same are hereby sustained, and that this suit be and the same is hereby dismissed for want of jurisdiction in this court. And thereupon came plaintiff in open court and filed his petition for an appeal and assignment of errors, and prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed upon the execution of a bond in penalty of $500.00 by plaintiff, M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to

make his plea good, which bond shall operate as a supersedeas."

It shows upon its face that the suit was dismissed "for want of jurisdiction in this court." It shows further upon its face "that plaintiff prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed."

The petition for the appeal, both opinions of the court, and in fact, every step in the record shows that the sole question considered was the question of jurisdiction in the Circuit Court. Of course, the record shows several contentions in regard to this jurisdiction. The motion to remand and the court's first opinion show plaintiff's contention that the court did not have jurisdiction, because the defendants were before the court by constructive service only, and because this was a common-law suit made a suit in equity by the State Statutes, and could not, therefore, be tried by a Federal tribunal. Defendants' motion to dismiss, defendant Pradt's special demurrer, and both opinions of the court show defendants' contentions that the Circuit Court had no jurisdiction, and the grounds on which these contentions were based. While the special demurrer does contain in its third, fourth, fifth and sixth causes of demurrer, other causes than that of jurisdiction, yet the opinions of the court and the final decree show that the other grounds were not considered, and that the sole question decided by the court was that of jurisdiction. The decree shows that the case was "heard and submitted on the plaintiff's motion to remand this case to the State court, and on defendant's demurrer to the jurisdiction of this court, and the motion of defendants to dismiss this case for want of jurisdiction in this court," and the whole record shows that these were the only matters, at any time, heard, submitted or decided. These involved the single question of whether or not the court had jurisdiction.

For the reasons herein urged and upon the authori-

ties cited, the appellant submits that this court has jurisdiction of the appeal herein, and that the motion to dismiss it should be denied.

Respectfully submitted,

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